

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA**

- 1 -

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BACKGROUND

1
2 A John Doe on 5 July 2023¹ published an article (or blog post) about the Plaintiff Oliver Smith
3 (“OS”) on the website Substack.com (URL: <https://cancelwatch.substack.com/p/oliver-d-smith-299>
4 [last accessed 26.05.2024].) Plaintiff maintains this article is defamatory (ECF #21, p. 6). The blog is
5 named Cancel Watch (“CW”). On 7 July 2023, the blog post was edited to add the following false
6 and libelous statement: “Oliver D. Smith is a British internet stalker.” Stalking is a serious crime in
7 Plaintiff’s country (England) under the Protection from Harassment Act 1997 (Section 2A). OS has
8 no criminal convictions, nor has he ever been arrested or charged with cyberstalking. Shortly prior to
9 the article creation, OS was threatened and blackmailed on a social media site. They threatened him
10 with a hugely “embarrassing article” to destroy his reputation unless he complied with their demands.
11 After OS refused to do what the blackmailer wanted – the article was published by CW on Substack.
12
13

14 The owner of CW further harassed the Plaintiff (and his family) by sending him abusive emails,
15 death threats, emailing his father’s employer and inciting others. Proton Mail suspended CW’s email
16 address they used to sign up to Substack.com (cancel.watch.account@proton.me). Note this email is
17 mentioned on CW’s blog: <https://cancelwatch.substack.com/about> [last accessed 26.05.2024]. Proton
18 Mail suspended this email account on 3 August 2023 for harassment/breaching their Terms of Service.
19 Harassment is ongoing to the extent the presumed owner of CW recently (14 May 2024) taunted OS
20 by email about (so far) having evading service since they remain anonymous as well as “laughing” at
21 Plaintiff (Exhibit #1) because his process server was refused entry into Substack’s building (ECF #7).
22
23

24 Plaintiff is aware Substack Inc., is not the publisher of the CW blog hence he included a “John
25 Doe” as a Defendant in his original (ECF #1, p. 2) and amended complaint (ECF #21, p. 2). OS asked
26
27

28

1 Plaintiff’s amended complaint mistakenly stated 5 July 2024 (ECF #21, p. 4).

1 Substack Inc., by email to disclose the identity of John Doe but they failed to respond. On 18 April
 2 2024, OS emailed attorneys of Substack Inc., requesting they ask their client to disclose the identity
 3 of the John Doe to save time of filing a subpoena with the court (“It would save time including the
 4 court’s if your client could voluntarily disclose this information to me and I can then serve the John
 5 Doe.”) Plaintiff did not receive a response to this request. Although OS acknowledges Substack Inc.,
 6 is not the publisher of CW (nor blackmailer), his claim for negligence against Substack Inc., is based
 7 on the fact they refused to respond to any of his complaints (by letters in post and email) over about
 8 a six-month period (from July to October 2023 which included 20-30 emails, three letters in the post
 9 and an additional email over Christmas). This is despite OS informed Substack Inc., about a police
 10 investigation into the blackmail and was requesting urgent assistance, an explanation, etc. (OS further
 11 argues CW acted negligently by breaching a contract and by not carrying out their Terms of Service).
 12

13 ARGUMENT

14 **A. PLAINTIFF DOES NOT CLAIM SUBSTACK IS A PUBLISHER**

15 Defendant in their motion to dismiss contradict themselves in their early paragraphs:
 16

17
 18 “Plaintiff does not allege that Substack authored the article, contributed to the
 19 content of the article... Plaintiff asserts one cause of action for negligence
 20 against Substack for failure to communicate with him about, and investigate,
 21 the allegedly defamatory article.”

22 The Defendant correctly recognizes Plaintiff does not regard Substack as a publisher (or author)
 23 of information but then proceeds to wrongly claim Plaintiff considers Substack Inc., to be a publisher:
 24

25 “Plaintiff’s attempt to hold Substack liable for not removing John Doe’s
 26 article is barred by Section 230(c)(1) of the CDA, 47 U.S.C. § 230(c)(1)
 27 (“Section 230”), which bars any cause of action that seeks to treat the provider
 28

1 of an “interactive computer service” (such as Substack) as the “publisher or
2 speaker” of information provided by a third party (such as John Doe).”

3
4 Plaintiff, however, does not treat Substack as a “publisher or speaker” and he has clarified this
5 in his amended complaint (ECF #21, p. 5). Instead, he pointed out that Substack Inc., are hosting the
6 Cancel Watch blog which was written by a John Doe. OS clearly distinguished between Substack as
7 an “interactive computer service” (which he called a “service provider”) and the third-party publisher
8 or “information content provider” (John Doe). Indeed, he could not have been clearer, e.g., writing:

9
10 “There are exceptional cases when internet platform providers are liable to
11 the content they host by third-parties even though they are not the publisher.
12 Plaintiff maintains this is one of those cases...”

13
14 **B. THIS CASE IS EXCEPTIONAL**

15 Defendant in their motion to dismiss argues Plaintiff’s claim is run-of-the-mill:

16
17 “An unbroken line of cases in the Ninth Circuit and elsewhere have applied
18 Section 230 to dismiss claims like this one, involving negligence, defamation,
19 or other causes of action based on allegedly false statements published
20 online.”

21 However, there appears to be very few similar cases where an interactive computer service fails
22 or refuses to respond to complaints about illegal (blackmail) and defamatory third-party content they
23 are hosting. Defendant does not reference a single similar case. Plaintiff accepts possibility of being
24 corrected but waits for Defendant to provide case law example where complaints by post and/or email
25 are completely ignored despite demonstrable criminal activity, libel, ongoing harassment, as well as
26 a police investigation. Substack Inc., unreasonably failed to respond to OS’s many complaints, despite
27
28

1 alerting them to an investigation by Hertfordshire Constabulary. Plaintiff got no help whatsoever from
2 Substack which arguably impeded the criminal investigation, at least concerning the identity of CW.

3
4 OS reported blackmail he received online to Hertfordshire Constabulary under the Malicious
5 Communications Act 1998. This was mentioned in his original and revised complaint (ECF #1, p. 5;
6 ECF #21, p. 4). Substack Inc., did not respond even though OS had informed them about a criminal
7 investigation. This included sending an email to ler@substackinc.com, for emergency disclosure of
8 Cancel Watch's registrant information to pass on to the police. Despite this, Substack Inc., still failed
9 to respond. Defendant seems to misconstrue OS's claim; his claim against Substack is not "based on
10 allegedly false statements published online" but that Substack Inc., unreasonably ignored OS's many
11 complaints or at least failed to respond which has caused him mental anguish and emotional distress.
12
13

14 **C. THREE-PRONG TEST**

15 Defendant in their motion to dismiss relies heavily on a widely recognized three-prong test to
16 establish whether an "interactive computer service" has immunity under Section 230(c) of the CDA:
17
18

19 "Immunity from liability exists for '(1) a provider or user of an interactive
20 computer service (2) whom a plaintiff seeks to treat, under a state law cause
21 of action, as a publisher or speaker (3) of information provided by another
22 information content provider.' When a plaintiff cannot allege enough facts to
23 overcome Section 230 immunity, a plaintiff's claims should be dismissed."

24 Although the Defendant asserts that "All three elements are easily met here" this does not appear
25 to be wholly true but only partially (2/3) and therefore immunity fails. While Defendant and Plaintiff
26 agree Substack is a so-called interactive computer service (namely a platform for online blogging and
27 newsletters) they disagree on interpreting Plaintiff's claim. Defendant's argument is that "Plaintiff's
28 negligence claim seeks to treat Substack as the publisher or speaker of the article." This is incorrect

1 and contradicts Defendant's recognition at the start of their motion to dismiss that Plaintiff does "not
2 allege that Substack authored the article" nor "contributed to the content of the article..." (Plaintiff
3 made this clear in his amended complaint). Defendant's argument is based on the following statement:

4
5 "Here, Plaintiff's entire complaint against Substack is premised on Substack's
6 hosting of the Cancel Watch article and its decision not to respond to
7 Plaintiff's requests to remove the article. FAC ¶¶ 12-16. Plaintiff further seeks
8 deletion of the article as a remedy. Id. ¶ 23. This claim treats Substack as a
9 publisher or speaker and satisfies the second element."

10 This is inaccurate since Plaintiff's complaint is not solely about Substack refusing "to respond
11 to Plaintiff's requests to remove the article" but the fact they failed to communicate with him at all;
12 investigate, cooperate with a criminal investigation, and respond to an emergency disclosure request.
13 As stated in both the original/amended complaints, Substack failed to respond to a single of Plaintiff's
14 emails/letters (ECF #1, p. 6; ECF #21, pp. 4-5). These were not all exclusive requests to remove the
15 article. For example, OS in his amended complaint pointed out that he alerted Substack to the fact the
16 email used to register Cancel Watch was suspended by Proton Mail for harassment (ECF #21, p. 4):
17 "[P]laintiff has passed evidence [...] the sign up email to cancelwatch.substack.com was suspended."
18 He was requesting an explanation and investigation. Several of Plaintiff's complaints by email² and
19 filling in a content violation form, made no request or mention of deleting the article (although many
20 did). They instead pointed out ToS violations (see below), illegal activity (blackmail, death threats)
21 and disabling of Cancel Watch's email (used to register an account at Substack). The Plaintiff argues
22 Substack's sheer failure to respond to these multiple reports, queries, and complaints was negligence.
23 Finally, Plaintiff does not dispute the third element. Substack is not the information content provider.
24
25
26
27

28 ² Tos@substackinc.com.

D. PLAINTIFF’S LEGAL ARGUMENTS

Defendant claims Plaintiff’s legal arguments are “improper and incorrect”. Firstly, arguing:

“It makes no difference to the application of Section 230(c)(1) if Substack chose not to respond to Plaintiff’s emails requesting that it remove third-party content from its service with those who seek to exercise a “heckler’s veto” and urge that content from other users be removed from the internet. *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014). To the contrary, Section 230 “protects against the ‘heckler’s veto’ that would chill free speech.” *Id.*; see also *Joude*, 2014 WL 3107441, at *4 (dismissing claims pursuant to Section 230 where blogging service was “informed” that allegedly harmful blog “was written by an impostor” and “refus[ed] to remove the Blog”).”

A cursory glance of these cited cases shows that the interactive computer services (defendants) in these cases had reasonably responded to complaints unlike Substack Inc., who failed or refused to do so. For example, in the cited case *Joude et al. v. Wordpress Foundation et al.*, C 14-01656 LB, 2014 WL 3107441 (N.D. Cal. July 3, 2014) Automattic responded within 24 hours (emphasis added):

“In March 6, 2014, plaintiff Alexandre sent an email to Automattic via WordPress requesting that they take down the Blog because “the author of this blog has usurped my identity to publish defamatory information about family members with photos that I do not know how he was able to obtain.” *Id.* ¶ 14; 3/7/14 Email, ECF No. 1-4, at 7. **Later the same day, Automattic responded that they “were in no position to arbitrate content disputes” but would remove any content “found to be defamatory or illegal by a U.S. court of law” in a formal order from a United States court. *Id.*”**³

³ <https://cases.justia.com/federal/district-courts/california/candce/3:2014cv01656/276422/19/0.pdf>

1 In contrast, Substack Inc., unreasonably failed to respond to dozens of emails sent by OS and
 2 refused communication. Defendant in their motion to dismiss fails to cite one example of case law
 3 where email complaints sent to service providers (interactive service providers) were ignored despite
 4 their seriousness; including criminal activity (such as blackmail), ongoing harassment, and a police
 5 investigation as in this case (*Smith v Substack...*); this speaks for itself and it supports the Plaintiff's
 6 argument his claim is exceptional and not run-of-the-mill. Defendant's mention of a "heckler's veto"
 7 is inappropriate since Plaintiff does not treat Substack to be a speaker (publisher). Plaintiff maintains
 8 he made this clear in his amended complaint contrary to the Defendant repeatedly claiming otherwise.
 9

10
 11 Secondly, Defendant claims Plaintiff confuses Section 230(c)(2)(A), with Section 230(c)(1).
 12 However, it is the Plaintiff's understanding that courts have "collapsed the two provisions together...
 13 with surprising regularity" (Eric Goldman, "MySpace Quietly Won Goofy 230 Ruling in September
 14 –Riggs v. MySpace," *TECH. & MKTG. LAW BLOG* (Nov. 30, 2009), URL: <https://bit.ly/2S3CMrW>).
 15 Eric Goldman is a law professor at Santa Clara University School of Law. The insightful document
 16 *Section 230: An Overview* by Congressional Research Service (January 2024) mentions the following:
 17

18
 19 "Section 230(c)(1) states that interactive computer service providers and users
 20 may not "be treated as the publisher or speaker of any information provided
 21 by another" person. Section 230(c)(2) provides that interactive computer
 22 service providers and users may not be "held liable" for any voluntary, "good
 23 faith" action "to restrict access to or availability of material..." One
 24 conception of these two provisions is that Section 230(c)(1) applies to claims
 25 for content that is "left up," while Section 230(c)(2) applies to claims for
 26 content that is "taken down." **In practice, however, courts have also applied**
 27 **Section 230(c)(1) to "take down" claims, and courts sometimes collapse**
 28

Section 230’s two provisions into a single liability shield or do not distinguish between the two provisions.”⁴ (emphasis added)

According to the Defendant, “Section 230(c)(1) does not require a showing of “good faith” as Plaintiff wrongly asserts” but this is questionable (based on the above two sources by legal experts). For this reason, OS maintains he not in error to cite *Smith v. Trusted Universal Standards in Electronic Transaction* in which motion to dismiss was denied because a service provider had acted in bad faith “when it failed to respond to Plaintiff’s repeated requests for an explanation”.⁵ The gist of Plaintiff’s argument is Substack acted in bad faith by refusing or failing to respond to his complaints and reports over a lengthy period (ECF #21, p. 5). Thirdly, Defendant states “it does not matter that ‘blackmail is a crime’”. However, Plaintiff emphasized blackmail in his amended complaint to highlight Substack’s unreasonable and extremely unhelpful behavior – ignoring multiple serious complaints about a crime even when a police investigation was mentioned, and emergency disclosure was requested by email. The case law examples the Defendant relies on relate to cases where service providers had reasonably responded to complaints. For example, *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 WL 5245490, at *3 cites *Zeran v. Am. Online, Inc.*, 129 F.3d, 237, 333 (4th Cir. 1997). In that same case:

“...Zeran called AOL... The employee [AOL] assured Zeran that the posting would be removed from AOL’s bulletin board but explained that as a matter of policy AOL would not post a retraction.”⁶

⁴ <https://crsreports.congress.gov/product/pdf/R/R46751> [last accessed 27.05.2024].

⁵ Defendant, however, is correct OS mistakenly referred to the summary judgment in that case; the proper citation to quote is apparently *Smith v. Trusted...* 2010 WL 1799456 (D.N.J. May 4, 2010).

⁶ <https://www.casemine.com/judgement/us/5914bc0cadd7b0493479a0dd> [last accessed 27.05.2024].

1 This sharply contrasts to Substack’s unreasonable behavior. Note that Substack Inc., cannot be
 2 contacted by phone and no Substack employee responded to OS’s many complaints. OS tried phoning
 3 Substack Inc., but their phone is disconnected (ECF #7, #9). This was confirmed by the process server
 4 he hired to serve Substack Inc (ECF #8), but who was inexcusably denied from entering their building,
 5 verbally abused, and literally thrown out by a security officer; this is despite Substack’s website states
 6 this address is the place for serving legal papers. Substack has continued to act both unreasonably and
 7 unprofessionally during these legal proceedings which Plaintiff believes adds to his negligence claim.
 8 Defendant disingenuously does not mention the above incident in the timeline they included in their
 9 “Factual and Procedural Background” section of their motion to dismiss: “After returning the waiver
 10 of service of process form that Plaintiff had sent by postal mail, Substack’s counsel explained to
 11 Plaintiff...” This ignores Plaintiff’s repeated attempts to send waiver of service forms (with a copy
 12 of the complaint) to Substack by a process server⁷ (who was ejected from Substack’s HQ) prior to the
 13 Defendant eventually responding to a package the Plaintiff mailed with the same forms by USPS. The
 14 first communication Plaintiff (indirectly) had with the Defendant was through their attorneys on 26
 15 March 2024 by an email, who returned a waiver of service of summons (in other words, this was a
 16 delay by four to five weeks when OS tried to make contact⁸) which the Plaintiff promptly responded:

17
 18
 19
 20 “I have tried to make contact with Substack Inc about the ADR and case
 21 management schedule but they have not responded to numerous emails I sent.
 22 In fact, Substack failed to respond to my complaints emailed last year
 23 including a letter before claim which I sent by post and email. Overall, they
 24 have ignored 20-30 emails sent from as far back as July 2023. Trying to get

25
 26 ⁷ The process server was refused entry into Substack’s HQ three times (8, 11, and 13 March 2024).

27 ⁸ As noted by OS (ECF #7), prior to hiring a process server he emailed Substack Inc about waiver of
 28 service, as well as sent the forms by post in mid-late February (those were completely ignored too).
 Defendant has wasted costs Plaintiff has had to spend on international postage and a process server.

1 in contact with them has been extremely difficult. I had also hired a process
2 server a few weeks back but they were denied entry to the Substack's main
3 building by security, three times, and Substack's phone number (which is the
4 only number for contact mentioned on their website) is disconnected so I
5 could not speak to them.”

6 Fourthly, Plaintiff concedes his reliance on Section 230(e) was misplaced and does not rely on
7 this as an argument. Fifthly, Defendant states “Even if the Cancel Watch article violated Substack’s
8 policies, Section 230 would still apply.” OS argues this does not follow. Again, Defendant wrongly
9 interprets Plaintiff’s claim as treating Substack Inc., as a publisher (case law examples the Defendant
10 provides are again largely irrelevant), for example quoting “removing content is something publishers
11 do” yet this overlooks the plaintiff’s argument was not solely about Substack’s failure to respond to
12 the Plaintiff’s requests to take down content but as already explained (above): failure to communicate
13 with him at all (to his complaints and/or reports); investigate, cooperate with a criminal investigation,
14 and respond to an emergency disclosure request. Plaintiff’s negligence claim partly rests on a breach
15 of contract – promissory estoppel because Substack Inc., promises or at least asserts on their website
16 under “support” they will respond to all reports such as content violations. To quote their own words:
17
18

19
20 “Question: Does the Trust & Safety team respond?
21

22 Yes, Substack’s Trust & Safety team does respond to inquiries and reports.
23 They aim to review each report within 72 hours. However, while they work
24 on resolving issues, they might not provide detailed updates or specific
25 outcomes due to privacy and confidentiality considerations (read more).”⁹
26
27

28

⁹ Substack Chat (<https://substack.com/support> [last accessed 27.05.2024].)

1 Similarly,

2
3 “Question: Why has the Trust & Safety team not responded to me?

4
5 I’m sorry to hear that you haven’t received a response yet. The Trust & Safety
6 team typically reviews reports within 72 hours, but it can sometimes take a
7 bit longer depending on the volume of inquiries they are handling. If it’s been
8 longer than this, I recommend checking your email spam or junk folder to
9 ensure their response hasn’t been misdirected there. If you still haven’t
10 received a response, you might consider submitting another request for an
11 update on your case.”

12 Substack refused to respond to OS’ request for an update and never responded to OS’s inquiries,
13 reports, and complaints, let alone gave him a “detailed update.” No evidence is available to Plaintiff
14 any of his complaints were investigated (Substack appears to have ignored all of them, at least, none
15 were responded to by post, phone,¹⁰ or email). This was unprofessional and negligent considering the
16 complaints and reports were of a very serious nature (including blackmail). The plaintiff believes that
17 in response to him sending a letter before claim to Substack (on 23 October 2023), they have modified
18 their “How do I report a content violation” page. This currently states: “Depending on the violation
19 you’re reporting, we might need to ask you a few extra questions while we investigate.” This sentence
20 was suspiciously updated 7 months ago¹¹ – the same time OS told Substack he was taking legal action.
21 Unfortunately, no available screenshot (or webpage archive) exists prior to this update, but Plaintiff
22 from memory believes that he read it in August 2023, and it differently stated, “we will ask you a few
23 extra questions while we investigate” (Substack modified this sentence to include words “might need
24
25
26

27
28 ¹⁰ OS provided his phone number to Substack.

¹¹ <https://archive.is/ILYdv> [last accessed 27.05.2024].

1 to"). It is unlikely to be another coincidence the same month he filed his lawsuit (February 2024) that
 2 Substack modified their "Publisher Agreement" page which they describe as a "binding contract."¹²

3 What interestingly has changed from the previous amendment in January 2023, is the acceptable use:
 4

5 "You [Publisher] also represent and warrant that you will not publish newsletters
 6 or otherwise use Substack in a manner that: is fraudulent, deceptive, threatening,
 7 abusive, harassing, tortious, defamatory, or in any way violates
 8 Substack's Content Guidelines."

9
 10 This formerly (before the amendment in February 2024) read:

11 "You [Publisher] also represent and warrant that you will not publish newsletters
 12 or otherwise use Substack in a manner that: is fraudulent, deceptive, threatening,
 13 abusive, harassing, tortious, defamatory, vulgar, obscene, libelous,
 14 objectionable, or in any way violates Substack's Content Guidelines."

15
 16 Thus, according to Substack's policy or ToS (when OS sent his complaints and reports in 2023)
 17 posting content that was merely "objectionable" was a violation which is easy to demonstrate. Although,
 18 Plaintiff does not solely base his argument on breach of contract for Plaintiff's refusal to remove the CW
 19 blog for this violation. His other core argument is Substack caused negligence for failing to respond to
 20 his complaints (ECF #21, p. 5): "Plaintiff's claim against Substack Inc is for negligence (personal injury)
 21 for refusing to explain, answer, or investigate the blackmail they are hosting" which he further considers
 22 a breach of contract. Arguably, the latter circumvents the Defendant's argument for immunity under
 23 Section 230 because the Plaintiff is not treating Substack as a publisher. This claim for negligence is a
 24 breach of contract – promissory estoppel for failing to respond to complaints (which Substack promises
 25
 26
 27
 28

¹² <https://substack.com/pa> [last accessed 27.05.2024].

1 to do) rather than remove content. Plaintiff believes that this argument is novel, so only finds support in
2 scant case law. One case he relies on is *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1106 (9th Cir. 2009):

3
4 “Promising is different because it is not synonymous with the performance of
5 the action promised. That is, whereas one cannot undertake to do something
6 without simultaneously doing it, one can, and often does, promise to do
7 something without actually doing it at the same time. Contract liability here
8 would come not from Yahoo’s publishing conduct, but from Yahoo’s
9 manifest intention to be legally obligated to do something, which happens to
10 be removal of material from publication. Contract law treats the outwardly
11 manifested intention to create an expectation on the part of another as a legally
12 significant event. That event generates a legal duty distinct from the conduct
13 at hand, be it the conduct of a publisher, of a doctor, or of an overzealous
14 uncle.”

15 Plaintiff is treating the service provider (Substack Inc.) as a ‘promiser’ rather than a publisher.

17 **E. PLAINTIFF’S CLAIM FOR NEGLIGENCE**

18 Defendant argues that plaintiff fails to state a claim for negligence. Plaintiff, however, thinks
19 he has stated a claim that has a realistic prospect of success, albeit it was not articulated, clarified too
20 well, or expanded on in his amended complaint like it has been above. OS’s amended complaint was
21 too short; he admittedly did not get his arguments across as well as he would have liked, and he used
22 a different layout template he downloaded to use as a pro se litigant (which restricted space to write)
23 rather than making his own like here. That said, Plaintiff will provide a rebuttal: first, Defendant says
24 “Plaintiff’s claim fails at the first step: he alleges no facts demonstrating the existence of a duty on
25 the part of Substack to investigate or respond to Plaintiff’s inquiries”. Yet as clarified, the existence
26 of duty is their promise or contract to respond to reports or complaints. Plaintiff alluded to this in his
27 amended complaint but apologizes if it was not clearer. When Defendant states the Plaintiff “merely
28

1 assumes that a duty is owed” he was basing this on having read Substack’s promises on their website
2 as well as their contract and guidelines (although he should have written more on this, he did mention
3 “Substack are clearly violating their own Terms of Service”). This also rebuts or refutes Defendant’s
4 argument “Plaintiff does not and could not allege a relevant duty of care, the negligence claim fails
5 as a matter of law and should be dismissed.” Plaintiff thinks otherwise based on promissory estoppel.
6

7
8 Secondly, Defendant in their motion to dismiss argues:

9
10 “Plaintiff’s negligence claim also fails because California law generally does
11 not recognize recovery of emotional distress damages for “a negligence claim
12 without physical injury, as opposed to damages to property or financial
13 interest.”

14 However, Defendant then goes on to note the following:

15
16 “...claim for negligent infliction of emotional distress absent physical,
17 property, or financial injury... can only arise in exceptional situations
18 involving “malice, breach of a fiduciary duty, physical injury or impact, or
19 some other unusually extreme or outrageous circumstance.” and no such thing
20 is alleged here. *Id.* (quoting Branch, 6 Cal. App. 4th at 801).”

21
22 The reality is Plaintiff emphasized in both his original and amended complaints an “unusually
23 extreme or outrageous circumstance”. That is, gross negligence, unreasonable, unprofessional, and
24 quite frankly appalling behavior by Substack Inc.,¹³ which continued well into these proceedings to
25 the extent Plaintiff sent two letters to the judge for misconduct (ECF, #7, #8); see also OS’s process
26 server’s affidavit or witness testimony (ECF, #9). To summarize, Substack Inc., failed or refused to
27

28

13 OS does not consider Defendant’s attorneys to be unprofessional or unreasonable only Substack.

1 respond to 20-30 complaints which impeded a criminal investigation, disconnected their phone so OS
2 could not speak with them, literally threw his process server out of their HQ three times (wasting the
3 Plaintiff's \$75 despite he is disabled, out of work and had to crowdfund money), ignored all of OS's
4 attempts at communication, the list goes so on. If this is not "unusually extreme or outrageous", the
5 Plaintiff does not know what is... Suffice to say, the Plaintiff has a very low opinion of Substack Inc.
6

7
8 Finally, Defendant argues for dismissal with prejudice and for dismissing the complaint without
9 leave to amend. However, Plaintiff argues that he can circumvent Defendant's argument for immunity
10 under Section 230; admittedly, this argument was not explained very well in his amended complaint
11 but can be perfected in a second amended complaint if need be; Defendant has though summarized it
12 above: negligence for breach of contract – promissory estoppel for failure to respond to complaints
13 or reports. This novel argument seemingly excludes the possibility of treating Substack as a publisher.
14 Because this argument has rarely been used before in case law, Plaintiff cannot rely on many other
15 cases that are similar, although can cite *Barnes v. Yahoo!, Inc.* In that case, the Ninth Circuit ruled the
16 plaintiff could state a breach of contract claim under theory of promissory estoppel because they did
17 not consider to holding Yahoo (i.e., the interactive computer service) liable "as a publisher or speaker
18 of third-party content but rather as the counterparty to a contract as a promissory who has breached."
19

20 CONCLUSION

21 For above reasons, Plaintiff argues the court should not grant Defendant's motion to dismiss and asks
22 to perfect his argument in a final (second) amended complaint if judge is not satisfied with Plaintiff's
23 explanation and clarification here so to leave to amend a last time. Defendant's argument for dismissal
24 with prejudice to avoid "...having to fight costly and protracted legal battles" should be disregarded
25 on the additional basis the Defendant wasted the Plaintiff's costs on a process server and had Substack
26 the courtesy to respond to a single of OS's complaints over six-months; they would not be in litigation.
27 If the judge does decide to grant the Defendant's motion, he requests time to file a subpoena against
28 Substack Inc., to disclose the identity of the blackmailer (CW) who they still appear to be protecting.

1 Dated: 28.04.2024 (May 28, 2024)

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3 Respectfully submitted,

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5 _____
6 Oliver D. Smith
7 Pro se.

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10 Plaintiff will file a separate (electronic) certificate of service.
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